BANK UTAMA (MALAYSIA) BHD

v.

CASCADE TRAVEL & TOURS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-1163-1998]
22 JUNE 2000

EVIDENCE: *Documentary evidence - Bankers' Books (Evidence) Act 1949 - Whether s. 90A Evidence Act 1950 prevails - Bank's statement of accounts - Produced by computer - Certificate - Evidence Act 1950, s 90A - When s. 90A(6) becomes effective*

The plaintiff tendered its statements of accounts which were produced by computer ('the documents') as an exhibit ('CSW-4') to its affidavit, as proof that the overdraft facilities had been disbursed to and/or utilised by the defendant. The defendant's counsel raised a preliminary objection challenging the admissibility of the documents as evidence on the ground that the plaintiff had failed to tender to the court a certificate stating that the documents were produced by a computer in the course of its ordinary use pursuant to s. 90A(2) Evidence Act 1950 ('the Act'). In reply, counsel for the plaintiff submitted inter alia that: (i) by virtue of s. 2 of the Act, the provisions did not apply to affidavits; and (ii) the documents were admissible under the Bankers' Books (Evidence) Act 1949 ('the BBEA').

Held:

[1] Although the Act does not apply to affidavits, it does not mean that an affidavit by a living person can be admitted as evidence *proprio vigore* without the necessity of the deponent taking the witness stand, unless s. 32 or s. 73A of the Act is applicable. Thus, once a challenge is taken to the affidavit or to the exhibit annexed to it, it then must be properly proven. As such, in the instant case, the documents must be properly proved pursuant to s. 90A of the Act.

[2] By virtue of s. 90C of the Act, s. 90A must prevail over the BBEA and any attempt to circumvent s. 90A(2) must fail.

[3] It is only after s. 90A(2) of the Act has been complied with that the deeming provision in s. 90A(6) becomes effective.

[Exhibit CSW-4 breached s. 90A of the Act; costs of the preliminary objection for the defendant in any event.]

Case(s) referred to:
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 ***(dist)***
Gomez v. Gomez [1969] 1 MLJ 228 ***(refd)***
Standard Chartered Bank v. Mukah Singh [1996] 3 MLJ 240 ***(refd)***

Legislation referred to:
Bankers' Book (Evidence) Act 1949, ss. 3, 4, 5
Evidence Act 1950, ss. 2, 3, 4, 32, 73A, 90A(2), (6), 90C

For the plaintiff - Chang Wei Mun; M/s Raja, Darryl & Loh
For the defendant - Wong Yuen Hock; M/s SL Tan & Associates

Reported by Izzaty Izzuddin

JUDGMENT

RK Nathan J:

The plaintiff applied by way of foreclosure proceedings to sell two units of property (the property) belonging to the defendant and charged to the plaintiff pursuant to three loan facilities provided to the defendant, namely:

(1) an OD facility for RM500,000;

(2) a bank guarantee for RM200,000; and

(3) a 2nd OD facility for RM350,000.

In response to the denial by the defendant as to the actual amount owed to the plaintiff and also in response to the defendant's contention that the plaintiff had failed to produce any proof that the overdraft facilities had been disbursed and/or used by the defendant, the plaintiff attempted to tender as an exhibit (CSW-4) to its affidavit (Encl. 10), statements of account of the plaintiff which were produced by computer (the documents) as proof that the overdraft facilities had been disbursed and/or utilised by the defendant.

The Preliminary Objection

The defendant now challenges the admissibility of the said documents as evidence, on the ground that the plaintiff had failed to tender to the court a certificate stating that the said documents were produced by a computer in the course of its ordinary use pursuant to the mandatory requirement of s. 90A(2) of the Evidence Act 1950 (the Act). Relevant portions of s. 90A of the Act read as follows:

90A. Admissibility of documents produced by computers, and of statements contained therein.

(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

(3) …

(4) …

(5) …

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

Notice of the said objection had been given well in advance.

Findings Of The Court

The defendant argued that since the said documents tendered were produced by a computer and is not a copy of any entry in a banker's book, the said documents are not therefore admissible as evidence under s. 90A of the Act as the plaintiff had failed to produce a certificate under s. 90A(2) of the Act. The defendant relied on *Standard Chartered Bank v. Mukah Singh* [1996] 3 MLJ 240 where the court had held that it was only if the evidence was challenged as to its admissibility that it was necessary to produce the certificate under s. 90A(2) of the Act. Since this challenge was taken in its affidavit itself, and since the plaintiff had not produced the said certificate, as such the defendant called for the expunging and/or cancellation of all such documents from the court's record.

Are The Documents Admissible Under s. 2 Of The Act?

Section 2 of the Act reads as follows:

> 2. Extent.
>
> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

The plaintiff submitted that a plain reading of this section means that the Evidence Act does not apply to affidavits presented to any court. It was the plaintiff's case that since Exhibit CSW-4 was part of the affidavit (Encl. 10) and since the Act did not apply to affidavits, equally s. 90A ought not to apply in this case. In *Gomez v. Gomez* [1969] 1 MLJ 228 the respondent, who was the former wife of the applicant, successfully obtained a divorce from him. Both were Catholics. The respondent was granted custody of their child and the applicant given access to visit her. The respondent later married a Hindu and the applicant applied by way of summons in chambers to vary the order of custody. One of the grounds in support of that application was the remarriage of the respondent to a Hindu. The respondent then obtained a letter from the assistant priest of the Catholic Church she attended, who stated in the said letter that the respondent was "still capable of taking care of her child's religious and moral upbringing". The applicant retorted in an affidavit that "in the eyes of the Roman Catholic Church by divorcing her husband and marrying a Hindu she is living in sin and cannot practise the religion whilst continuing to live in daily sin." The applicant thus applied for leave to cross-examine the respondent and the said assistant priest who signed the said letter. It was argued for the respondent that whilst the court could allow for cross-examination of the respondent, the court could not allow the assistant priest to be cross-examined as he never deposed to any affidavit. Raja Azlan Shah J (as His Highness then was) said at p. 230:

> …The respondent says that she is still capable of looking after the child's religious and moral upbringing. The Rev. Father Wood supports her. It is the same as if he has sworn an affidavit to that effect. It is therefore only fair and proper that the appellant be allowed to cross-examine them on their affidavits.

The exhibit, namely, the letter, was deemed part of the affidavit and cross-examination or the said letter was therefore allowed.

Whilst s. 2 no doubt says that the Act does not apply to affidavits and by virtue of the decision in *Gomez v. Gomez* it ought also not to apply to exhibits annexed to the affidavits, acceptance of the plaintiff's argument

gives a too simplistic approach to the challenge raised by the defence. Whilst the Act does not apply to affidavits it does not mean that an affidavit by a living person can be admitted as evidence *proprio vigore* without the necessity of him taking the witness stand. In order for such evidence to be admissible it should be capable of being regarded as a statement falling under s. 32 (cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant) or under s. 73A (admissibility of documentary evidence in civil cases, etc.) of the Act. Once a challenge is taken to the affidavit or to the exhibit annexed to it, then it must be properly proved. Therefore it is my judgment that s. 2 does not assist the plaintiff in this case and the said documents must be properly proved pursuant to s. 90A of the Act.

Are The Documents Admissible Under The Bankers' Books (Evidence) Act 1949 (The BBEA)?

It is necessary to reproduce the relevant sections of the BBEA:

> 2. In this Act, unless the context otherwise requires -
>
> …
>
> "banker's book" includes any ledger, day book, cash book, account book and any other book used in the ordinary business of bank;
>
> 3. Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded.
>
> 4. (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.
>
> (2) Such proof may be given by an officer of the bank, and may be given orally or by an affidavit sworn before any magistrate or person authorised to take affidavits.
>
> 5. (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct.
>
> (2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorised to take affidavits.

It would seem that once the provisions of ss. 4 and 5 are complied with, then pursuant to s. 3, a copy of any entry in a banker's book shall, in all legal proceedings be received as *prima facie* evidence of such entry. The plaintiff then referred to encl. 14 which is the affidavit of one Ch'ng Seong Wah, the plaintiff's branch manager, who affirmed the affidavit based on records within his possession and from his own personal knowledge. Referring to the exhibit in question, namely, CSW-4, he averred that the CSW-4 contained a true account of the statements of the overdraft accounts of the defendant that had been sent to the defendant each month. These statements were taken from the books of the plaintiff kept in the normal course of business and that the records were at all material times within his custody and control. Having compared the contents of CSW-4 with the original from the books he averred that the contents of CSW-4 were true and correct.

Unfortunately however for the plaintiff s. 90C of the Act reads as follows:

> 90C. Sections 90A and 90B to prevail over other provisions of this Act, the Banker's Books (Evidence) Act 1949, and any written law.
>
> The provisions of sections 90A and 90B shall prevail and have full force and effect notwithstanding anything inconsistent therewith, or contrary thereto, contained in any other provision of this Act, or in the Bankers' Books (Evidence) Act 1949, or in any provision of any written law relating to certification, production or extraction of documents or in any rule of law or practice relating to production, admission, or proof, of evidence in any criminal or civil proceeding.

In the circumstances, therefore, the provision of s. 90A(2) of the Act must prevail over the BBEA and any attempt to circumvent the strict requirement of s. 90A(2) must fail.

If s. 90A Applies, Has It Been Complied With?

The plaintiff now contends that by virtue of s. 90A(6) so long as a document is produced by a computer it is deemed to be produced by the computer in the course of its ordinary use and therefore the plaintiff seeks the admission of the documents contained in exhibit CSW-4. This submission blindly bypasses the need to satisfy the requirement of s. 90A(2) of the Act. It is only after sub-s. (2) has been complied with that sub-s. (6) becomes effective. In *Gnanasegaran Pararajasingam v. Public Prosecutor* [1997] 3 MLJ 1 the Court of Appeal held that the defence merely challenged the admissibility of the computerised documents for failing to comply with s. 90A(2) in that no certificate was produced. The Court of Appeal held that proof of the contents of the computerised documents can either be by producing a certificate signed by someone solely in charge

of the computer which produced the printout as required by s. 90A(2) or by an officer of the bank. In that case the bank officer testified with regard to the documents because he was in charge of the operations of the current accounts and the said bank officer was not challenged by the appellant on the accuracy of the entries of the documents produced. It is obvious that *viva voce* evidence was adduced by the bank officer, albeit, not challenged. Such oral testimony is clearly admissible and does not fall foul of s. 2 of the Act. Since in the case before me the plaintiff chose to proceed by way of originating summons all evidence must be by way of affidavit evidence. In the circumstances, since no leave has been applied to adduce oral evidence, what is before me is exhibit CSW-4 which has breached s. 90A(2) of the Act.

The Preliminary Objection Of The Defendant Is Well Taken

The defendant has asked me to dismiss the entire originating summons as without the said documents as contained in CSW-4 which now stands rejected, there is no evidence to substantiate the alleged amount owed under the overdraft facilities. The plaintiff has submitted "that there are many affidavits which show the amount owing by the defendant to the plaintiff" and that they would be referred to at the hearing of encl. 1. It is therefore fair and proper that I hear the parties on encl. 1. I will allow the defendant the costs of the preliminary objection in any event.